Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 16-10

October 20, 2016

Department of Business

Summary: An applicant sought access to details of a loan offer between the Province of Nova Scotia and Irving Shipbuilding. The Department of Business (Department) withheld information claiming that certain portions of the records were "not responsive" to the access request. The Department claimed that disclosure of certain other information would variously harm the Department's economic interests, harm the business interests of a third party business, and unreasonably invade the personal privacy of third party individuals.

The Commissioner finds that none of the reasons for withholding information were established, and recommends full disclosure.

In this case, the Department determined information in a responsive record was "not responsive" to the access request and withheld the information from disclosure on that basis. The Commissioner conducts a purposive analysis of *FOIPOP* to determine whether public bodies have such authority. She considers the differing approaches taken by commissioners and courts across Canada. The Commissioner concludes that *FOIPOP* does not permit severing information as "not responsive" because applicants define the scope of the access request, and a purposive analysis of *FOIPOP* requires disclosure unless a limited and specific exemption found in the *Act* applies to withhold the information.

The Commissioner also reiterates the need for detailed explanation and evidence to establish that disclosure would harm the financial interests of either the public body or the third party business. She finds further that, in the specific facts of this case, the business contact information of the individuals named in the records would not be an unreasonable invasion of their privacy.

Statutes Considered: *Access to Information Act*, RSC 1985, c A-1, s. 6; *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2, s. 8; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, ss. 6, 11; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 2, 5, 6, 7, 13, 17, 20, 21, 41, 45; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s.2, 10; *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, s. 6; *Personal Information Protection Act*, SBC 2003, c 63, s. 1.

Authorities Considered: Alberta: Orders 97-020, 1998 CanLII 18626 (AB OIPC); 99-002, 1999 CanLII 19639 (AB OIPC); F2012-08, 2012 CanLII 70613 (AB OIPC); **British Columbia:** Orders F08-03, 2008 CanLII 13321 (BC IPC), F15-23, 2015 BCIPC 25 (CanLII); F15-58, 2015 BCIPC 61 (CanLII); **Nova Scotia:** Review Reports FI-06-13(M), 2006 CanLII 21751 (NS FOIPOP); FI-07-59, 2008 CanLII 50497 (NS FOIPOP); FI-09-04, 2011 CanLII 92511 (NS FOIPOP); FI-09-100, 2015 CanLII 70493 (NS FOIPOP); FI-10-41, 2011 CanLII 33001 (NS FOIPOP); FI-10-59(M), 2015 CanLII 39148 (NS FOIPOP); FI-10-95, 2015 CanLII 79097 (NS FOIPOP); FI-11-71, 2016 NSOIPC 3 (CanLII); FI-12-01(M), 2015 CanLII 54096 (NS FOIPOP); FI-13-28, 2015 NSOIPC 9 (CanLII); 16-01, 2016 NSOIPC 1 (CanLII), 16-03, 2016 NSOIPC 3 (CanLII); 16-04, 2016 NSOIPC 4 (CanLII); 16-08, 2016 NSOIPC 8 (CanLII); **Ontario:** Orders P880, 1995 CanLII 6411 (ON IPC); PO-1885, 2001 CanLII 26085 (ON IPC); MO 3210, 2015 CanLII 38838 (ON IPC); **Prince Edward Island:** Order No. FI-16-003, 2016 CanLII 48834 (PE IPC).

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245 (FCTD); Atlantic Highways Corp. v. Nova Scotia (1997) 162 N.S.R. (2d) 27,* 1997 CanLII 11497 (NS SC) *Canada (Information Commissioner of Canada) v. Canada (Prime Minister) (T.D.),* [1991] 1 F.C. 427, 1992 CanLII 2414 (FC); *Canadian Pacific Hotels Corp. v. Canada (Attorney General),* 2004 FC 444 Can LII; *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)* [1996] 1 FCR 268, 1995 CanLII 3539 (FC); *Chesal v. Attorney General of Nova Scotia* (2003) 2003 NSCA 124 (CanLII); *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403 1997 CanLII 358 (SCC); *Fuller v. R. et al. v. Sobeys,* 2004 NSSC 86*; Lavigne v. Canada (Office of the Commission of Official Languages)* [2002] 2 SCR 773, 2002 SCC 53 (CanLII); *Monkman v. Serious Incident Response Team,* 2015 NSSC 325; *O'Connor v. Nova Scotia,* 2001 NSCA 123; *Quinn v. Leathem*, [1901] A.C. 495 (H.L.); *X. v. Canada (Minister of Defence)* [1992] 1 F.C. 77; *Stevens v. Nova Scotia (Labour),* 2012 NSSC 367.

Other sources considered: *Black's Law Dictionary,* 7th ed, (St Paul, MN: Thomson West, 2004) "monetary"; Centre for Law and Democracy, Canadian RTI Rating: http://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating/; *Concise Oxford English Dictionary*, (New York: Oxford University Press, 2011) "monetary"; David Jackson, "Province loans Irving $304 million for shipbuilding", The Chronicle Herald, March 30, 2012: http://thechronicleherald.ca/novascotia/79307-province-loans-irving-304-million-shipbuilding; Paul McLeod, "Irving payroll leans on taxpayers", The Chronicle Herald, March 19, 2013: http://thechronicleherald.ca/novascotia/1069112-irving-payroll-leans-on-taxpayers; Office of the Information and Privacy Commissioner for Newfoundland, Practice Bulletin: Redacting Non-Responsive Information in a Responsive Document, Original Issue Date May 11, 2016: http://www.oipc.nl.ca/pdfs/RedactingNonesponsiveInformationinaResponsiveDocument.pdf; Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto, Ont: Irwin Law, 2007).

INTRODUCTION:

[1] On March 30, 2012 former Premier Darrell Dexter announced that the Nova Scotia Government had made a decision to enter into a loan agreement with Irving Shipbuilding Inc. (Irving Shipbuilding) for up to $304 million in loans. There was significant public discussion at

the time regarding the loan agreement. This is the first of two review reports in relation to two separate requests for copies of the loan agreement although the requests were worded differently and sent to two different public bodies.

[2] In this case, the applicant requested: "the loan agreement between the Province of Nova Scotia and Irving Shipbuilding in the amount of $260 million, including the terms and conditions of the loan, the interest rate and the job targets to be met." The initial response came from the Department of Economic and Rural Development and Tourism (ERDT). The applicant was provided with partial access to the records. The ERDT applied a number of exemptions to withhold portions of the requested information. The applicant then filed a request for review with this office on April 18, 2013.

[3] When the ERDT ceased operations in April 2015, the responsive records were transferred to the Department of Business (Department). The responsibility for processing of this access request, including participating in the review proceeding, was given to the Information Access and Privacy Office (IAO) within the Department of Internal Services. The IAO provides centralized access and privacy services for a number of government departments including the Department of Business. For the purposes of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*), it is the head of the public body that has custody or control of the records that is responsible for any decision made under *FOIPOP* with respect to the records. In this case, it is the Minister for the Department of Business who is the head of the public body.

ISSUES:

[4] There were five issues listed in the Notice of Formal Review:

1. Is the Department authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems non-responsive?
2. Is the Department authorized to refuse access to information under s. 13 of *FOIPOP* because it would reveal the substance of deliberations of the Executive Council or any of its committees?
3. Is the Department authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?
4. Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?
5. Is the Department required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[5] As noted below, the issues were reduced to the four following discussions during the course of the conduct of this review.

DISCUSSION:

Background

[6] The applicant in this case filed an access to information request in March of 2013. In response, the ERDT discussed the request with the applicant and "refined" the request to read:

> The letter of offer between the Province of Nova Scotia and Irving Shipbuilding in the amount of $260 million, including the terms and conditions of the loan, the interest rate and the job targets to be met.

[7] As a result, the ERDT produced twenty one pages of responsive records consisting of two documents: a letter dated July 8, 2011 and a letter dated January 10, 2012. The disclosed portions of these documents indicate that the July 8, 2011 letter is titled "Letter of Offer – Irving Shipbuilding Inc." and the January 10, 2012 states that it is an amendment to the acceptance date contained in the July 8, 2011 letter.

[8] The version of these two documents provided to the applicant in response to his access to information request included severing of names, various terms and conditions and the bulk of the financial analysis of requested assistance set out in Appendix C to the July 8, 2011 letter. The Department cited cabinet confidence (s. 13), harm to the economic interests of the pubic body (s. 17), unreasonable invasion of a third party's personal privacy (s. 20), harm to the business interests of a third party (s. 21) and "out of scope" as the basis for withholding the information.

[9] The severing of the responsive records in this request was identical to the severing done in response to a request made in June 2012 to the Executive Council Office by another applicant. That request was the subject of a review request to this office and is discussed in Review Report 16-11 released simultaneously with this decision.

[10] In this case, the applicant did not provide any submissions in favour of his position. The Department chose to rely on submissions it made to this office in December, 2013. The third party relied on submissions it had provided to the Department on May 1, 2012 when the Department originally consulted it regarding the potential release of records in relation to the Letter of Offer.

[11] In the course of reviewing the material for this review it came to my attention that a number of the provisions withheld from the responsive records were publicly disclosed in a newspaper article that appeared on the same day that the Department denied access to the applicant in this review (March 19, 2013). An investigator from this office spoke with the newspaper reporter who advised that shortly before he wrote the article he had made repeated requests to the government for a complete copy of the loan agreement. He believed that in response to a number of earlier newspaper articles on the topic and because of his repeated contacts with the government, a Vice President of Irving Shipbuilding provided him with a complete copy of the Letter of Offer. He no longer had a copy of the record provided by Irving

Shipbuilding but it was on the basis of that document that he was able to disclose the details that appear in his article.[1]

[12] I provided the third party and the Department with a copy of the newspaper article and the information provided by the reporter and asked for any further comment. As a result, on August 26, 2016 the Department provided a further release of information to the applicant.[2] The Department disclosed many of the withheld terms and conditions and no longer relies on s. 13. Further, the Department now specifies s. 17(1)(b) as the relevant s. 17 provision relied upon to withhold a portion of the record.

Burden of Proof

[13] With respect to the application of s. 17 and "not responsive", it is the Department that bears the burden of proof. Where the information being withheld is the personal information of people other than the applicant (s. 20), the applicant bears the burden of proof. Where the information being withheld is identified as confidential third party business information (s. 21) it is the third party that bears the burden of proof.

> 45 (1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.
> (2) Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.
> (3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
>
> (a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and
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> (b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

General Approach

[14] This is a case where it is worth repeating that Nova Scotia's access legislation is unique in that it declares as its two core purposes: a commitment to ensure that public bodies are fully accountable to the public and to ensure the disclosure of all government information with necessary exemptions that are limited and specific.[3]

[1] Paul McLeod, "Irving payroll leans on taxpayers", The Chronicle Herald March 19, 2013: http://thechronicleherald.ca/novascotia/1069112-irving-payroll-leans-on-taxpayers.
[2] A similar release occurred in response to the second related request discussed in NS Review Report 16-11.
[3] *FOIPOP* s. 2.

1. Is the Department authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems not responsive?

[15] As noted above, the Department identified two documents as being responsive to the request. The first was the Letter of Offer dated July 8, 2011. The Department withheld information in that letter as out of scope or not responsive. The second responsive document was a letter dated January 20, 2012. The Department originally withheld one line of information in the letter as out of scope but subsequently disclosed the withheld line of information in its August, 2016 release.

[16] The Department used the terms "out of scope" and "not responsive" to describe its reasons for withholding information.[4] I have used the terms interchangeably.

[17] There are two schools of thought across Canada as to whether or not a public body, such as the Department in this case, may withhold information as "out of scope".

Federal Court Decisions

[18] At the federal level, the Federal Court has determined in at least two cases that information within a responsive record cannot be withheld as out of scope. In *X. v. Canada (Minister of Defence)* [1992] 1 F.C. 77, the Court determined that the fact that information is not directly related to an access request is not a basis for exemption under the Act and the public body therefore did not have reasonable grounds to refuse to disclose the information.[5]

[19] In *Canadian Pacific Hotels Corp. v. Canada (Attorney General)* 2004 FC 444,[6] the Court again determined that there is no exemption available based on relevancy. In *Canadian Pacific Hotels*, the applicant sought copies of all agreements signed since April 1, 1997. The public body identified two Crown leases dated April 1969 and February 1982 as responsive. The public body had determined that the older records were indeed responsive because they were referred to in other documents that fit within the requested time period and because they carried a historical and contextual relevance for the agreements signed since April 1 1997.

[20] The Court states:

> Sufficient detail is required to permit identification of a record and an adequate response to the Request. The wording of s. 6 contains no prohibition against disclosing documents that are not relevant to the Request. In fact, s. 6 does not even address the concept of relevancy. It merely stipulates that a request must be made in writing and must provide sufficient detail to allow the identification of the record requested. It would take a substantial amount of reading in to conclude that this imposes an obligation on the government institution to refrain from disclosing information that is not relevant to the

[4] Other terms sometimes used include non-responsive, non-relevant and not relevant.
[5] *X. v. Canada (Minister of Defence)* [1992] 1 F.C. 77 at para. 44. I am aware of a decision made by Justice Denault in *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)* [1996] 1 FCR 268, 1995 CanLII 3539 (FC) at para. 21 where the Court appears to disagree with the findings in *X. v. Canada*. However, a careful reading of the statement made by the Court in the *Canadian Jewish Congress* case makes clear that the Court was talking in that case about relevant documents, not relevant information within a document.
[6] *Canadian Pacific Hotels Corp. v. Canada (Attorney General),* 2004 FC 444 Can LII ["*Canadian Pacific Hotels*"].

> Request. Bearing in mind the underlying objectives of Parliament in enacting the Act, as embodied in s. 2, I find there is no exemption available to the Applicant based upon relevancy.[7]

[21] Information and Privacy Commissioners in Ontario and Alberta have determined that information may be withheld from records as being "out of scope" or not relevant to the request. The Newfoundland Commissioner has issued a practice directive permitting the practice of out of scope severing.

Ontario OIPC

[22] In Ontario Order P-880, an adjudicator determined that a public body was entitled to withhold portions of a record as not relevant to the applicant's request. The adjudicator's analysis begins by pointing out that the applicant in that case had made a request for information as opposed to one for specified records or documents. The adjudicator further points out that the Ontario Act refers to a right of access to records or a part of a record.[8] Based on that wording, the adjudicator concluded that the Ontario legislation recognizes that only portions of a document may be responsive to requests for general information.

[23] The adjudicator had this to say about responsiveness:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.[9]

[24] Therefore, public bodies in Ontario must entertain requests for information which may be contained in a part of a record, as opposed to the record itself. Where the request is for information, the information being sought may be contained in various documents and the balance of one or more of these documents may not have a bearing on or relevance to the information requested. Put another way, the adjudicator concludes that the fact that some

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[7] *Canadian Pacific Hotels* at para. 31. Section 6 of the *Access to Information Act*, RSC 1985, c A-1 referred to by the Court in *Canadian Pacific Hotels* provides: 6. A request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record.

[8] Ontario Order P880 at p. 11 quoting s. 10(1) of Ontario *Freedom of Information and Protection of Privacy Act* RSO 1990, c F.31: 10. (1) Subject to subsection 69 (2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[9] Ontario Order P880 at p. 10.

irrelevant information is located next to some relevant information does not make the irrelevant information relevant.[10]

[25] The adjudicator concludes that public bodies must consider whether information which is responsive is meaningful when it is only portions of a larger document because the information which is disclosed must be meaningful. If the applicant is not satisfied with the response, he or she can submit another, more broadly worded request to capture the information or records the public body decided were not responsive to the request as currently framed.

[26] Nova Scotia does not have a provision equivalent to s. 10(1) of the Ontario law on which the Ontario out of scope rule interpretation is based. Section 10(1) of the Ontario law gives the applicant the right of access to a record or part of a record.[11] Instead, Nova Scotia's law provides:

> 5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with section 6.

Newfoundland OIPC

[27] In 2015, Newfoundland's access law was significantly amended and is now considered to be one of the most modern and effective laws in Canada, if not the world.[12] The right of access in the Newfoundland law is a right of access to a record. Unlike the Ontario law discussed above, there is no mention in the general right provision of a right to a "part of a record".[13] Despite this, the Office of the Information and Privacy Commissioner for Newfoundland and Labrador recently issued a practice bulletin entitled, "Redacting Non-Responsive Information in a Responsive Document".[14] In that bulletin the Commissioner notes that the practice of severing non-responsive information within responsive records has been widely accepted and endorsed by Commissioners in a number of jurisdictions and has also been a long standing and accepted practice in Newfoundland.

[28] There are no decisions or cases in Newfoundland explaining the legal basis for this interpretation of Newfoundland's access law. Instead, the practice is simply that; a practice based on experience. Given that there is no legal analysis available in support of the practice, it is of interest but not of assistance in determining whether such a practice is permitted under Nova Scotia's *FOIPOP*.

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[10] Ontario Order P-880 at p. 12. I note that while this decision was issued in 1995, the principles were applied as recently as June 2015 in Order MO 3210 and is quoted with approval in the Alberta line of cases beginning with Alberta Order 97-020 at para. 32 discussed below.

[11] See footnote 8.

[12] For example, the Centre for Law and Democracy now rates Newfoundland's law as the best in Canada: http://www.law-democracy.org/live/global-rti-rating/canadian-rti-rating/.

[13] *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2 provides in s. 8: "(1): A person who makes a request under section 11 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant. (2) The right of access to a record does not extend to information excepted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record."

[14] Office of the Information and Privacy Commissioner for Newfoundland and Labrador, Practice Bulletin: Redacting Non-Responsive Information in a Responsive Document, Original Issue Date May 11, 2016 at: http://www.oipc.nl.ca/pdfs/RedactingNon-ResponsiveInformationinaResponsiveDocument.pdf.

Alberta OIPC

[29] Alberta has a series of cases examining the issue of responsiveness beginning with Order 97-020 issued by former Commissioner Robert Clark. In that decision, Commissioner Clark considered the question: "Does the Act allow the removal of non-responsive information from a record?" He points out that the Ontario line of cases are based in part on the provision in their Act that grants a right of access to a "record or a part of a record". Alberta, like Nova Scotia and Newfoundland, does not have an equivalent provision. Instead, the Alberta law simply states that individuals have a "right of access to any record" and there is no mention of a right to "a part of a record".[15]

[30] Commissioner Clark notes however, that s. 11 of the Alberta law (equivalent to s. 7(2) of Nova Scotia's *FOIPOP*) requires that applicants must be told whether access to the record "or part of it" is granted or refused, how access to a record "or part of it" will be given and the reasons for refusal to access to a record "or part of it". On that basis he concludes that s. 11 of the Alberta Act appears to contemplate that there may be situations in which a public body would provide an applicant with access to a part of a record, rather than the entire record.[16] He concludes that a public body may grant access to part of the record that contains the responsive information and may remove the non-responsive information from that record.

[31] There are two practical reasons that support this interpretation according to Commissioner Clark:

- If public bodies cannot remove non-responsive material, they will have to expend resources notifying third parties in relation to information that has no bearing on the subject matter of a request.
- It recognizes that government organizations create records for a variety of reasons and some documents may be created to serve multiple purposes.

[32] Commissioner Clark then considers what is responsive: "information" or the "record"? He concludes that, based on the definition of "record" in the Alberta Act, the only difference between "information" and "record" is that a particular kind of "information" may be something less than the entire record of information (regardless of the form of the record) if there are other kinds of information in that record.[17] The fundamental first step is to look at an applicant's request to decide what records a public body must search out, thereby determining what records are responsive to the request.

[33] One year later Commissioner Clark issued another decision on the issue of non-responsive information. He adds a further clarification to his analysis when he states, "Generally when an

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[15] Section 6 of Alberta's *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, provides: "6(1) An applicant has a right or access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant."

[16] Alberta Order 97-020 at para. 42. Alberta Order 97-020 is the leading case on this issue and has been relied upon recently in Alberta Order F2012-08.

[17] Alberta Order 97-020 at para. 56.

applicant asks for "records" rather than "information", a public body cannot withhold portions of the records on the basis of non-responsiveness."[18]

[34] Commissioner Clark's reasoning has not been adopted in any other jurisdiction in Canada and, most recently, has been respectfully rejected in both British Columbia and PEI.

British Columbia OIPC

[35] Recently, the Deputy Commissioner of the Office of the Information and Privacy Commissioner for British Columbia completed an extensive analysis of whether or not a public body under BC's access law is permitted to sever information within a record as out of scope.

[36] In BC Order F15-23, the public body stated that it only severed information as "out of scope" where, in its opinion, the information was not relevant and did not add anything by way of background or context. Using a purposive approach to the interpretation of BC's access law, the Deputy Commissioner concludes that there is no provision of the BC law authorizing a public body to withhold portions of records because the public body decides they do not respond to the request.[19]

[37] The Deputy Commissioner determines that public bodies may be mistaken in their interpretation of the request's terms and that applicants don't have to say why they're asking. Therefore, a public body is not in a position to know with certainty that portions of a record do not add any context or further the goal of meaningful disclosure. The Deputy Commissioner points out that very often the background, context or relevance of portions of records will be a mystery to the public body. Finally he notes that if an applicant gets a document redacted as "non-responsive" then their only recourse is to appeal or make a new request asking for the "non-responsive" portions. The Deputy Commissioner concludes that the only part of a record that may be removed is that which is protected by an exception under Division 2 of Part 2 of BC's *FOIPOP*.[20]

[38] With respect to the Alberta line of cases that reached the opposite conclusion, the BC adjudicator simply disagrees with the Alberta analysis stating that the analysis "discerns conflict where none exists."[21] With respect to the Ontario cases that similarly determined that non-responsive information may be withheld, the Deputy Commissioner distinguishes the BC approach from the Ontario cases by the fact that the basic right to access in Ontario's law includes a reference to a right to "part of a record" that does not appear in the BC law.[22]

Prince Edward Island

[39] In a recent decision, Commissioner Rose evaluates the Ontario, Alberta and British Columbia case law with respect to severing of non-responsive information within a record. She concludes that public bodies are not authorized to refuse access to portions of records that a public body deems non-responsive.

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[18] Alberta Order 99-002 at para. 25.
[19] BC Order F15-23 at para. 42.
[20] BC Order F15-23 at para. 67.
[21] BC Order F15-23 at para. 51.
[22] BC Order F15-23 at para. 56.

[40] Her analysis emphasizes that in the PEI access to information law, the term "record" is used in the context of the right of access and the term "information" is only used in the context of exceptions to disclosure and under the provisions that deal with the protection of privacy.[23] She emphasizes s. 6(2) of the PEI law:

> 6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[41] With respect to the Alberta decision that permitted the practice, Commissioner Rose states simply, "With great respect to Commissioner Clark's findings, I find that there is no exception to disclosure contained in the FOIPP Act that authorizes a public body to except non-responsive information from a responsive record."[24]

[42] With respect to the Ontario line of decisions, Commissioner Rose highlights two important distinctions between Ontario's and PEI's access laws. First, Ontario's law provides that the purpose of the Act is to provide a right of access to information under the control of institutions, whereas PEI's law provides for a right of access to records. Further, Ontario's right of access states that every person has a right of access to a record or a part of a record, whereas PEI's law provides for a right of access to any record (no mention of a part of a record).

[43] Commissioner Rose considers the PEI provision that requires a public body to inform an applicant whether access to a record or part of it is granted or refused. She states, "it is a given that an applicant may be provided with the whole of a record or, if a public body finds a record contains information excepted from disclosure under one of the FOIPP Act's provisions, only a part of a record."[25]

[44] The Commissioner acknowledges that there are practical reasons that support an interpretation permitting removal of non-responsive information. However, she concludes that the words of the statute do not permit such an interpretation. She points out that applicants under PEI's access law are not requesting information, they are requesting records containing information. The PEI law gives applicants the right to records, as long as there is information therein that is responsive to the request.[26]

Nova Scotia

[45] On at least three occasions in the past 10 years, former Review Officer McCallum considered the issue of whether or not a public body could withhold information within a record as either "not responsive" or "not applicable". In 2008, the Department of Community Services received a request for a copy of the Child Protection Services Policy Manual. In its response, the Department of Community Services withheld sample forms that used fictitious names stating that the information was not responsive to the access request. Review Officer McCallum notes that

[23] PEI Order No. FI-16-003 at para. 16.
[24] PEI Order No. FI-16-003 at para. 18.
[25] PEI Order No. FI-16-003 at para. 21.
[26] PEI Order FI-16-003 at paras. 26 and 27.

the applicant asked for the entire policy manual. After quoting a portion of Ontario decision P-880 where the adjudicator stated that the first step in responding to a request is to determine which documents are relevant, Review Officer McCallum states simply that, "To claim that fictitious names in a manual are not responsive has no basis or validity under the Act."[27]

[46] In 2011, Review Officer McCallum took a slightly different tact. In that case, the Department of Transportation and Infrastructure Renewal (Transportation) withheld information it said related to other projects. The Review Officer says, "In order for the Review Officer to entertain the use of "NR" as a reason to redact the Record, Transportation must clearly show how this information is "not responsive" to the Form 1 Application for Access to a Record."[28] And later in the same decision, "I find that "not responsive" cannot be used as if it were an exemption to try and withhold information that does not fit within any of the exemptions simply because the public body does not want to release it…I find that "not responsive" has been used by Transportation to shelter access to parts of the Record that are in fact responsive and do not fall under any exemption claimed. Inappropriate comments, marginally relevant or incorrect information and information provided by the Applicant, are not reasons to withhold information as "not responsive."[29]

[47] Finally, in December 2011, Review Officer McCallum determined that where an applicant had made a request for "all information the department has gathered… on my case" this meant that any record that had to do in any way with the case would be responsive.[30] She went on to determine that, "Once a page is deemed to be responsive to an applicant's Application for Access to a Record, the entire page is responsive, unless certain "limited and specific" exemptions apply."[31] She notes that the *FOIPOP* provision that permits severing of a record allows a public body to deny access to "information exempted from disclosure pursuant to this Act." This was a reference to s. 5(2) of *FOIPOP*.

[48] She recommended that where the information identified as non-responsive qualified as third party personal information, it could be subject to s. 20. Otherwise, public servants "need to be cautious to restrict e-mail to the business matter at hand or risk personal discussion being made public."[32]

[49] Review Officer McCallum's December 2011 decision was the subject of an appeal by the applicant pursuant to s. 41 of *FOIPOP*. Following an *in camera* session, the Department of Transportation agreed to produce further documents and on that basis the Court was satisfied that the Department of Transportation (the respondent in the appeal) had provided all of the documents to which the applicant was entitled. However, before concluding its decision, the Court states in obiter:[33]

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[27] NS Review Report FI-07-59.
[28] NS Review Report FI-10-41 at p. 21.
[29] NS Review Report FI-10-41 at p. 22.
[30] NS Review Report FI-09-04 at p. 27.
[31] NS Review Report FI-09-04 at p. 27.
[32] NS Review Report FI-09-04 at p. 27.
[33] "Obiter" is a term to describe opinion or commentary unnecessary for the decision in a case.

> There are a couple of issues that I wish to address further. It appears the initial review officer may have taken the position that the Respondent could not withhold documents on the basis that they were irrelevant. The Respondent referred to those materials as "not applicable". According to the Respondent the Review Officer suggested there was no recognized exemption under FOIPOP legislation for "non applicable" materials. Any such ruling would defy common sense. What possible relevance would it be to the Appellant if someone commented in a document that their grandmother had a wart removed from her nose. (Not that any such comment was made in the redacted materials). With e-mail communications the author on a number of occasions mixed personal or non relevant communications with information which was properly disclosed. The personal, non relevant, information is not something to which the Appellant is entitled to access. There are some things in records, such as e-mail, which are clearly irrelevant and should not be disclosed. The types of documents that fall in the "not applicable" category include, for example notes from unrelated investigations or proceedings. The Appellant has no right to see those types of documents just because they are in an officer's notebook. As I have noted, to suggest non relevant documents are to be produced on a FOIPOP application defies common sense and the scope of the legislation.[34]

[50] One of the challenges of this comment is that Justice Russell uses "document" and "information" interchangeably. On both occasions when he states his common sense rule, generally he says that the production of non-relevant documents defies common sense. But when he gives examples he discusses email communications that may include non-relevant personal information.

[51] No one disagrees that non-relevant documents need not be produced. The first step in the processing of any access to information request is the gathering of relevant records or documents. In fact public bodies are not required to process requests until the applicant has supplied sufficient particulars to enable the public body to identify the requested and so relevant record.[35]

[52] Justice Russell's comments do not form the basis for the decision but are rather general observations or commentary – known in legal parlance as obiter. The decision (or ratio decidendi) is set out in paragraph 12, but Justice Russell goes on in subsequent paragraphs to address a "couple of issues" further.

[53] The traditional view for what is and is not "binding" upon lower courts was expressed by the Earl of Halsbury L.C.:

> "a case is only an authority for what it actually decides", and that every judgement must be read as applicable to the particular facts proved, or assume to be proved since the generality of the expressions which may be found there are not intended to be expositions

[34] *Stevens v. Nova Scotia (Labour)*, 2012 NSSC 367 at para. 13.
[35] Section 6(1)(b) and s. 5(1) of *FOIPOP* set out this requirement.

> of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.[36]

[54] Finally, Justice Russell did not have the benefit of the cases discussed above and the reasoning they provide for why non-relevant severing might not be permitted under *FOIPOP*. There is no purposive analysis of *FOIPOP* and no explanation for how such an additional exemption might be read into *FOIPOP* in light of the purposes of the Act.

[55] For those reasons, I am satisfied that Justice Russell's comments on the topic of non-relevant information within a relevant record are informative but not binding.

[56] I conclude that *FOIPOP* does not permit severing or removing of information within a responsive record on the basis that the public body is of the view that information is "out of scope", "non-responsive" or "not applicable" for five reasons which I will discuss below:

a. It is the applicant, not the public body who defines what is and is not responsive to a request.
b. Nova Scotia's *FOIPOP* specifically provides for the right to "all government information" and access to "any" record.
c. Out of scope severing is not a specific and limited exemption under the Act.
d. Disclosing the full record is consistent with the purposes of the Act.
e. In order for an out of scope exemption to exist, such an exemption would have to be "read in" to *FOIPOP*.

a. Applicant defines scope

[57] It is the terms of the applicant's request for access that defines what is or is not responsive to a request. The public body's duty, as stated in *FOIPOP*, is to "make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely."[37]

[58] Further, applicants are required to provide sufficient particulars to enable the public body to identify the record. It may be that the applicant only wants certain information, but our law is designed such that it requires applicants to identify "records". *FOIPOP* gives applicants the right to records, as long as there is information therein that is responsive to the request.

[59] It is the procedure for obtaining access under s. 6 of *FOIPOP* that makes this clear. To obtain access to a record applicants must "specify the subject-matter of the record requested with sufficient particulars to enable an individual familiar with the subject-matter to identify the record". If applicants fail to sufficiently identify the record, the public body does not have to process the request until sufficient particulars are provided.[38]

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[36] Quinn v. Leathem, [1901] A.C. 495 (H.L.) at p. 506.
[37] Section 7(1)(a) of *FOIPOP*.
[38] This is apparent from s. 7(2) of *FOIPOP* which provides that the public body shall respond within 30 days after the application is received and the applicant has met the requirements of clause 6(1)(b). Section 6(1)(b) is the provision that requires applicants to specify the subject matter of the record requested with sufficient particulars to enable the public body to identify the record.

[60] I would add that there is a false assumption behind a public body determining that some piece of information within a responsive record is somehow not responsive to the applicant's request. I agree with the Deputy Commissioner that it is for the applicant to decide whether the information adds context or furthers the goal of meaningful disclosure.[39] Applicants do not have to give a reason for their request, and so the background, context or relevance of portions of records may well be a mystery to the public body. In other words, it is very likely that something a public body may view as "not relevant" may be exactly the information the applicant was hoping to find within the requested record. There is no way a public body can know with certainty that information within a record is "out of scope" of the applicant's request without asking the applicant.

b. Right to "all" government information and "any" record

[61] *FOIPOP* refers to both "records" and "information". Like PEI's access law, the term "record" is used in the context of the right of access in Nova Scotia. Unlike PEI's access law, the term "information" is not only used in the context of exceptions to disclosure and under the provisions that deal with the protection of privacy. In the purpose section of *FOIPOP*, a core purpose of *FOIPOP* is to give the public a "right of access to records".[40] But Nova Scotia's law has a second unique purpose provision:

> 2 (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific…[emphasis added]

[62] The right of access in *FOIPOP* is a right to access any record:

> 5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.
>
> 5(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.

[63] Section 5(2) makes three things clear:

- The right given is the right of access to a record, not a part of a record, the whole record.
- The right of access to a record does not extend to information exempted from disclosure pursuant to *FOIPOP*.
- If information can reasonably be severed from the record pursuant to the Act then the applicant has a right of access to the remainder of the record.

[39] BC OIPC Order F15-23 at para. 67.
[40] Section 2(a)(i) and 2(b)(i) of *FOIPOP*.

c. Out of scope severing is not a specific and limited exemption under the Act

[64] The leading case in Nova Scotia regarding the proper interpretation of *FOIPOP* is *O'Connor v. Nova Scotia*.[41] In that case, the Court of Appeal, after listing the two purposes in s. 2(a) and 2(b) of *FOIPOP*, states:

> Thus, it seems clear to me that the Legislature has imposed a positive obligation upon pubic bodies to accommodate the public's right of access and, subject to limited exceptions, to disclose all government information so that public participating in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.
>
> The FOIPOP Act ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.[42]

[65] The Court specifically considers the unique purpose section 2(b). It says:

> I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participating in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives.

[66] The final general statutory interpretation guidance provided by the Court in *O'Connor* was:

> It is also well established in this province that freedom of information legislation is to be broadly interpreted in favour of disclosure.[43]

[67] A careful review of *FOIPOP* reveals that there is no exemption or exception permitting withholding of information from a responsive record because the information is irrelevant, non-responsive or out of scope.[44] The Court in *O'Connor* is clear that all government information must be disclosed subject only to "specific and limited" exemptions and limited exceptions. Since none exists for out of scope severing within a responsive record, in my view, information within a responsive record cannot be withheld on this basis.

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[41] *O'Connor v. Nova Scotia*, 2001 NSCA 132 [*O'Connor*].
[42] *O'Connor* at paras. 40-41.
[43] *O'Connor* at para. 72.
[44] This is consistent with the Federal Court's findings in *Canadian Pacific Hotels* where the Court noted that "the wording of s. 6 contains no prohibition against disclosing documents that are not relevant to the Request."

d. Disclosing "out of scope" or "not relevant" information is consistent with the purposes of the Act

[68] In my opinion, providing an applicant with a complete copy of a record subject only to limited and specific exemptions, even if this means providing what the public body views as "out of scope" or "not responsive" information is entirely consistent with the purposes of *FOIPOP*. Access to "all government information" is how *FOIPOP* achieves its purposes of facilitating informed public participation in policy formulation, ensuring fairness in government decision-making and permitting the airing and reconciliation of divergent views. In addition, such an approach gives meaning to the Court's decision in *O'Connor* that *FOIPOP* is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.

e. Reading in the right to exempt "out of scope" information

[69] In order to find that public bodies in Nova Scotia are entitled to withhold or sever information they view as "non-responsive" from responsive records I would, in essence, have to "read in" to *FOIPOP* an exception or exemption based on relevance. The Federal Court in *Canadian Pacific Hotels* considered and rejected this approach. I agree.

[70] "Reading in" is a statutory interpretation method used by courts to fill a gap in a legislative scheme. Courts cautiously use this technique in order to expand the scope of the legislative text to matters that are neither implicitly nor explicitly in the legislation.[45] The circumstances where courts have read in provisions generally involved filling a necessary procedural gap in order for the matter before the court to continue. This is clearly not the case here, and further, such "reading in" would be, in my view, entirely inconsistent with the clearly stated purposes of *FOIPOP*.

Conclusion

[71] In summary, it is far more consistent with the purpose provisions of *FOIPOP* to determine that the legislature intended irrelevant information to be disclosed than it is to determine the opposite. The legislation is intended to subject government to public scrutiny. Allowing government officials a non-specific unlimited right to selectively sever information it views as irrelevant, out of scope or not responsive from responsive records would be entirely inconsistent with the essential purpose of *FOIPOP*, with the actual design of *FOIPOP* and with the well-established approach that freedom of information legislation be broadly interpreted in favour of disclosure.

[72] Therefore, I conclude that *FOIPOP* does not authorize a public body to withhold information within a responsive record on the basis that it is somehow "out of scope", "not relevant" or "non-responsive".

[73] I acknowledge that there are practical considerations that support allowing non-responsive severing within a responsive record and this does create a challenge for public bodies. But the answer is quite straightforward. If a public body identifies information within a record that it believes is not responsive to the applicant's request they can contact the applicant to see if the applicant is interested in the information. If not, then the information can be withheld on the

[45] Ruth Sullivan, *Statutory Interpretation* p. 121.

basis of the applicant's agreement. The applicant would, of course, have the right to request a review should he or she believe, upon receipt of the response, that the information is in fact responsive.

[74] I find that the Department was not authorized to withhold any information as "out of scope" or "not responsive".

2. Is the Department authorized to refuse access to information under s. 17(1)(b) of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?

[75] In its original response to the applicant, the Department simply cited s. 17(1) as authority for exempting information from disclosure, but in its submission to this office the Department stated that it had considered ss. 17(1)(b), (d) and (e) in particular. In the recent updated release to the applicant the Department cited s. 17(1)(b) as the basis for withholding a portion of the record and so I have only considered the applicability of s. 17(1)(b):

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the Government of Nova Scotia and that has, or is reasonably likely to have, monetary value;

[76] I previously examined the meaning of s. 17(1)(b) of *FOIPOP* in Review Report FI-09-100. I noted that s. 17(1)(b) has two requirements. First, it provides that a public body may refuse to disclose financial or commercial information that belongs to a public body. Second, such information must have or be reasonably likely to have monetary value.

[77] In this case, the type of information withheld under s. 17 consists of the following:[46]

- maximum shareholders equity value, and
- the financial analysis of the requested assistance to Irving Shipbuilding.

[78] The above-noted information is contained in the Letter of Offer dated July 8, 2011. This document sets out the terms and conditions for financial assistance to Irving Shipbuilding. The terms "financial" and "commercial" information are not defined in *FOIPOP*. However, it has been generally accepted that dictionary meanings provide the best guide and that it is sufficient

[46] The list that follows does not disclose the withheld information but rather indicates the type of withheld information which is apparent from the disclosed portions of the record.

for the purposes of the exemption that information relate or pertain to matters of finance or commerce as those terms are commonly understood.[47]

[79] In this case, the withheld information consists of one detail of one of the terms of the proposed financial assistance to Irving Shipbuilding and the financial analysis of the requested assistance. Based on a review of the contents of these documents I am satisfied that the withheld information constitutes financial information.

[80] But can it be said that this information "belongs to a public body or to the Government of Nova Scotia"? The Letter of Offer is intended to layout the circumstances under which the Government of Nova Scotia (Government) is prepared to provide up to $304 million in financial assistance. The purpose of the Letter of Offer is at least in part, to ensure that the assistance will be used in a manner approved by the Government. After all, $304 million is a substantial investment of taxpayer money and therefore required that the government establish, through agreement or otherwise, clear terms and conditions for the provision of funds in order to protect such an investment. For those reasons, I find that the information qualifies as belonging to the public body.

[81] Does this information have or is it reasonably likely to have monetary value? The Department says that the information has "monetary value" in the sense that other companies would use it as a basis to negotiate better terms from the Province. "Monetary" is not defined in *FOIPOP*. The Concise Oxford English Dictionary defines it as follows:

> Monetary – adj. relating to money or currency [48]

[82] Black's Law Dictionary provides:

> Monetary. The usual meaning is "pertaining to coinage or currency or having to do with money", but it has been held to include personal property.[49]

[83] Two things are clear. First, it is not any value that will do. *FOIPOP* clearly requires that the value be monetary. Second, based on the usual definitions for the word "monetary", the value is in relation to money.[50] For information to have monetary value in the context of s. 17(1)(b) there must be a reasonable likelihood of independent monetary value in the information concerned.[51]

[84] In Review Report FI-09-100, I evaluated the monetary value of terms of a venture capital agreement. In deciding that the public body had failed to establish that the terms had monetary value, I noted that the challenge was that the "monetary value" element was remote at best. The evidence established at most that a competitor might be able to use the information to its

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[47] As discussed in NS Review Report FI-13-28 at para. 14 with reference to *Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245 (FCTD).*
[48] *Oxford*, "monetary" at p. 923.
[49] *Black's*, "monetary" at p. 906.
[50] I conducted a similar analysis in NS Review Report FI-09-100 at paras. 76-68.
[51] This is the test applied to the equivalent BC provision as explained in BC Order F15-58 at paras. 32-33.

advantage. The value of the information would depend upon the nature of the deal, the ability of the competitor to use the information effectively and the ultimate outcome of the deal. The actual monetary value was unclear and, in my view, speculative at best. The fact that information may be of interest or benefit to others does not mean that it has independent monetary value.[52]

[85] The same reasoning applies here - that is, it is difficult to see how the information could be used to the advantage of a competitor, who the competitor might be or how a similar circumstance could arise in which the unique terms of this agreement could have actual monetary value.

[86] The Department states that the withheld information has monetary value in the sense that other companies would use it as a basis to negotiate better terms from the Province. How exactly this might occur is not explained. How could a company place the Province at a disadvantage? Why would simply knowing the terms of this agreement force the Province to agree to similar or worse terms from a taxpayer perspective?

[87] According to the public disclosures regarding the loan agreement, the Province's support was essential for ensuring that Irving Shipbuilding won "Canada's largest-ever defence contract" in October, 2011.[53] The CEO of Irving Shipbuilding explained at the time that one of the categories used to rate bidders for the shipbuilding contract was whether there would be any cost to the federal government beyond the cost of the ships. Irving Shipbuilding said the yard needed capital work and the company would be penalized if it asked for federal money. As a result of the provincial loan, Irving Shipbuilding was able to include a zero cost to Ottawa in its bid and so score higher than its nearest competitor.[54]

[88] The motivation behind the Province's decision to supply the loan was explained by former Premier Dexter: "These shipbuilding contracts represent the single most important opportunity Nova Scotia has ever seen to create jobs and to propel our economy into the future."[55]

[89] Given the unique circumstances that motivated the Province to agree to the loan it is impossible to even speculate as to who a competitor might be, how it could use any of the withheld terms to its advantage or why or how the Province would be at a disadvantage if the terms were known. Neither the Department nor the third party provided any explanation or evidence for how such a circumstance might arise. As a result, I find that the Department has failed to establish that the withheld information has "monetary value" within the meaning of s. 17(1)(b).

[90] Section 17 is a discretionary exemption that therefore requires an assessment of whether or not discretion was properly exercised. However, because I have found that the requirements of s.

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[52] NS Review Report FI-09-100 at para. 83
[53] David Jackson, "Province loans Irving $304 million for shipbuilding", The Chronicle Herald, March 30, 2012 http://thechronicleherald.ca/novascotia/79307-province-loans-irving-304-million-shipbuilding.
[54] As reported by David Jackson.
[55] As quoted by David Jackson.

17(1)(b) have not been met, I will not evaluate the Department's submissions on its exercise of discretion in this case.

3. Is the Department required to refuse access to information under s. 20 of *FOIPOP* because disclosure of the information would be an unreasonable invasion of a third party's personal privacy?

[91] The Department withheld the name and position of an individual employee of a third party and two signatures of third parties contained in the records claiming that the disclosure of this information would be an unreasonable invasion of a third party's personal privacy within the meaning of s. 20 of *FOIPOP*.

[92] The proper approach to the s. 20 analysis in Nova Scotia is well established. I have discussed the four step approach to the s. 20 analysis in a number of recent review reports and so will not repeat that analysis here.[56] In summary, the four steps are:

i. Is the requested information "personal information" within the meaning of s. 3(1)(i)? If not, that is the end. Otherwise the public body must go on.
ii. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.
iii. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?
iv. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

i. Is the requested information "personal information" within the meaning of s. 3(1)(i)?

[93] In Review Report FI-12-01, I noted that one of the purposes of Nova Scotia's access law is to protect the privacy of individuals with respect to personal information about themselves.[57] I further noted that cases across a number of jurisdictions in Canada have consistently found that the disclosure of an individual's identity in a business capacity is not an unreasonable invasion of personal privacy within the meaning of sections equivalent to s. 20(1) of Nova Scotia's *FOIPOP*. In some cases the courts, including the Supreme Court of Canada, have characterized business contact information as not being "about" an identifiable individual and so not satisfying the definition of personal information.[58] In other cases courts and commissioners have determined that business contact information lacks a distinctly personal dimension and so release of the information would not constitute an unreasonable invasion of personal privacy.[59]

[94] In Nova Scotia, personal information includes an individual's name, address or telephone number. There is no specific exemption for business contact information in our definition and so

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[56] NS Review Reports 16-08, FI-10-95, FI-11-71, 16-03 and 16-04 which are based on the Nova Scotia Supreme Court decision in *House, Re*, 2000 CanLII 20401 (NS SC) [*House*] at p. 3.
[57] *FOIPOP* s. 2(c). In NS Review Report FI-12-01 I referred to the equivalent provision in the *Municipal Government Act*: s. 462(c).
[58] See for example Ontario Order PO-1885 at p. 2 and *Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403 1997 CanLII 358 (SCC) at para. 94.
[59] NS Review Report FI-12-01 at para. 41.

I conclude that business contact information does qualify as personal information for the purposes of *FOIPOP*.

ii. Are any of the conditions of s. 20(4) satisfied?

[95] No party suggested that any of the conditions in s. 20(4) are satisfied in this case. I agree, s. 20(4) does not apply.

iii. Would the disclosure of the personal information be a presumed unreasonable invasion of privacy pursuant to s. 20(3)?

[96] The Department cites a 2004 decision of the Supreme Court of Nova Scotia in *Fuller v. R. v. Sobeys* for the proposition that name and title of official of a third party relate to and are part of employment history and so the presumption in s. 20(3)(d) of *FOIPOP* applies to this type of information.[60] The Department states that it believes it is "bound" by this finding and so must withhold this type of information.

[97] Section 20(3)(d) provides:

> 20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (d) the personal information relates to employment or educational history

[98] To be clear, s. 20(1), like all exemptions, is fact specific. In the *House* decision, the Supreme Court in Nova Scotia has been clear that there is a four step analysis that must be conducted before determining whether or not s. 20(1) applies in a particular case.[61] So, even if the s. 20(3)(d) presumption could be said to apply to this type of information by virtue of the *Fuller* decision, public bodies must still, in every case, go on to assess whether or not the presumption is outweighed in the particular facts of the case at issue.

[99] The finding in *Fuller* that s. 20(3)(d) applies to business contact information is inconsistent with decisions in other jurisdictions in Canada. The common thread in these cases is that business contact information lacks a distinctly personal dimension.[62] In fact, in many jurisdictions, legislatures have added a clear exception to the definition of personal information to ensure that business contact information (name, title, employer, phone number, etc.) is not withheld under the "unreasonable invasion of personal privacy" test.[63] Most persuasively, the finding in *Fuller* is not consistent with an earlier finding by the Supreme Court of Canada in *Dagg* noted above.

[100] Under *FOIPOP*, s. 20 cannot be applied to names and positions of public service employees because s. 20(4)(e) states that a disclosure of personal information is not an

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[60] *Fuller v. R. et al. v. Sobeys*, 2004 NSSC 86, 2004 NSSC 86 at para. 38.
[61] Re *House*.
[62] NS Review Report FI-12-01(M) at para. 41, with reference to a decision by former Commissioner Loukidelis in Order F08-03.
[63] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s.2., *Personal Information Protection Act*, SBC 2003, c 63, s. 1.

unreasonable invasion of a third party's personal privacy if the information is about the third party's position, functions or remuneration as an employee of a public body.

[101] In this case, the third party names and titles appear in documents detailing a loan made by the Government to Irving Shipbuilding. The names appear strictly in a business capacity. There is no employment history or personal information of any kind associated with the names as they appear on the documents. In this case I find that s. 20(3)(d) of *FOIPOP* does not apply to the withheld information. Alternatively, even if s. 20(3)(d) applied, I find that the presumption is outweighed by a number of relevant circumstances discussed below.

iv. In light of any s. 20(3) presumption, and in light of the burden upon the applicant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that the disclosure would constitute an unreasonable invasion of privacy or not?

[102] Whether a presumption applies or not, I must complete the fourth step of the analysis which is to answer the question: in light of any s. 20(3) presumption and in light of the burden upon the applicant, does the balancing of all relevant circumstances lead to the conclusion that the disclosure would constitute an unreasonable invasion of personal privacy or not?

[103] I consider the following circumstances to be relevant in this case:

- The name, title and signatures appear on a Letter of Offer to loan Irving Shipbuilding $304 million. This is a significant financial investment on the part of Nova Scotian taxpayers and as such was a matter of keen public interest. Evidence of the public interest is apparent from the numerous media stories still available online at the time of the loan announcement. I am satisfied on that basis that disclosure of the identities of the individuals who signed this agreement on behalf of Irving Shipbuilding is desirable for the purpose of subjecting the activities of the Government of Nova Scotia to public scrutiny within the meaning of s. 20(2)(a) of *FOIPOP*. This factor weighs strongly in favour of disclosure.
- Signatures are commonly used to confirm an individual's identity and to disclose this information to another individual may the open door for improper and even malicious uses. This weighs against disclosure.
- One of the two signatures is already publicly available. This weighs in favour of disclosure.
- The identities of the signatories on behalf of Irving Shipbuilding are not otherwise available in the document in that the names are not printed or typed below the signature lines. Therefore the only way to identify who signed the agreement on behalf of Irving Shipbuilding is through the signatures themselves. This weighs in favour of disclosure.
- The signatures are in a work-related context. This weighs in favour of disclosure.

[104] Balancing all of the relevant factors, I find that the disclosure of the third party name, title and signatures in this case would not be an unreasonable invasion of the third parties' personal privacy and so s. 20(1) does not apply to this information.

4. Is the Department required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[105] In its original response to the applicant, the Department withheld a variety of information citing s. 21 as authority for the exemption. However, following its recent review and disclosure, only one type of information continues to be exempted under s. 21: the breakdown of the value of infrastructure upgrades listed in Appendix B to the January 8, 2011 letter. The recent disclosure to this applicant in August 2016 included a disclosure of the list of items in the combat program but continued to withhold the value of the thirteen items listed.

[106] Section 21 of *FOIPOP* provides in part:[64]

> 21(1) The head of a public body shall refuse to disclose to an applicant information
> (a) that would reveal
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
> (b) that is supplied, implicitly or explicitly, in confidence; and
> (c) the disclosure of which could reasonably be expected to
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party;
> (iii) result in undue financial loss or gain to any person or organization…

[107] It is well established that s. 21 must be read conjunctively and so all three parts of the test must be satisfied in order for s. 21 to apply.

[108] In summary, the type of information withheld under s. 21 consists of the following:[65]

- the breakdown of the infrastructure upgrades including the identification of the combat and non-combat programs, the item and the value of the upgrades, and
- the financial analysis of the requested assistance to Irving Shipbuilding.

(a) Reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party.

[109] In evaluating this part of the s. 21 test, it is necessary to consider three questions:

1) Does the withheld information constitute trade secrets, commercial, financial, labour relations, scientific or technical information?
2) Is the withheld information, information <u>of</u> the third party?
3) Or does the withheld information <u>reveal</u> commercial, financial etc. information of the third party or allow for accurate inferences about such information?

[64] A copy of the *Freedom of Information and Protection of Privacy Act* is available on our website at foipop.ns.ca.
[65] The list that follows does not disclose the withheld information but rather indicates the type of withheld information which is apparent from the disclosed portions of the record.

[110] The information withheld under s. 21 is the dollar value of infrastructure upgrades at Irving facilities set out in Appendix B. A disclosed portion of the loan agreement states that "the Company is eligible to earn Loan forgiveness based on Capital Costs associated with the projects set out in Appendix B." The forgiveness is tied to incremental tax benefits associated with the capital costs.

[111] The leading case in Nova Scotia on this issue is *Atlantic Highways Corp. v. Nova Scotia*.[66] In *Atlantic Highways*, the public body argued that the commercial information contained in an Omnibus Agreement (for the construction of a toll highway), was not proprietary to the third party because in the form it appeared in the Omnibus Agreement, it was the product of negotiation with the Province. The Province further argued that portions of the agreement simply reflected the Province's requirements as set out in its Request for Proposal. The Court agreed stating:

> I thus conclude that the information AHC seeks to protect has either been already exposed to publication or is so intertwined with the Provincial input by way of the requirements of the 'Request for Proposal' or modified by the negotiation process that it clouds AHC's claim to a proprietary interest in the information. I am therefore not satisfied by the Appellant AHC, after reviewing the evidence, including the specific clauses referred to by them in the Omnibus Agreement, that the information they seek to protect is one of the categories of information listed in 21(1)(a).[67]

[112] Former Review Officer Bishop determined that contracts can contain terms that fit within the definition of commercial and financial information, but may also contain terms that do not fit either because they are matters of a standard nature or because they are so intertwined with input from the public body during the negotiation process that it is difficult to state with a degree of confidence how the information would fall under one of the categories listed in s. 481(1)(a).[68]

[113] In this case, the third party recited a list of some of the terms originally withheld under s. 21 and stated, "the documentation clearly contains commercial and financial information of Irving Shipbuilding Inc." The Department's submission is that, "The information in the severed sections is obviously commercial or financial information, and thus the first part of the test is met."

[114] The Court in *Atlantic Highways* states that the negotiation process may cloud any third party proprietary interest in information such that the information can no longer be said to be "of the third party".

[115] Based on the terms of the loan agreement, I am satisfied that the value of the infrastructure upgrades for the non-combat program was information supplied by Irving Shipbuilding. The Department was not in a position to estimate what capital upgrades were

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[66] *Atlantic Highways Corp. v. Nova Scotia* (1997) 162 N.S.R. (2d) 27, 1997 CanLII 11497 (NS SC), ["Atlantic Highways"].
[67] *Atlantic Highways*.
[68] NS Review Report FI-06-13(M) at p. 6.

required and the loan agreement itself does not include any term that suggests these amounts were subject to negotiation. Rather, the repayment term was simply tied to the incremental tax benefits associated with the capital costs. On that basis, I am satisfied that the information withheld under s. 21 was financial information of a third party for the purposes of s. 21(1)(a) of *FOIPOP*.

[116] I find that the information withheld under s. 21(1) satisfies the requirements of s. 21(1)(a).

(b) Supplied implicitly or explicitly in confidence

[117] I must next consider whether the information meets the requirement that it was supplied implicitly or explicitly in confidence. The third party argues that the information is not otherwise publicly available and that it was supplied or agreed to with the expectation that it was provided in confidence. Further, it argues that loan agreements by their very nature are confidential. Corporations acting prudently, for commercial and competitive reasons, do not disclose their financing arrangements. The Department says the information meets the test because it was provided, discussed and negotiated implicitly in confidence.

[118] Neither party offered any evidence in support of its position. Nor did either party point to any provision in the letter of offer to support their position. In fact, the schedule to the agreement includes a standard confidentiality clause that notes that such agreement is subject to the *Freedom of Information and Protection of Privacy Act*.

[119] I find that the information withheld in the Letter of Offer was not supplied in confidence and so does not meet the test in s. 21(1)(b).

(c) Reasonable expectation of harm

[120] I have concluded that the information withheld under s. 21 has not met the s. 21(1)(b) tests and so s. 21 cannot apply. In case I am wrong and for the sake of completeness in this case, I will go on to evaluate the evidence of harm offered by the parties.

[121] The third requirement of s. 21 is that the disclosure of the information could reasonably be expected to cause one or more of the harms listed in s. 21(1)(c) of *FOIPOP*. The reasonable expectation of harm test in Nova Scotia's legislation is consistent with other access to information legislation in Canada.

[122] Decisions by former Review Officers have consistently held that a number of factors are relevant in determining whether or not a reasonable expectation of harm exists. Those factors are:

- There must be more than a possibility of harm.[69]

[69] NS Review Report FI-06-13(M) at p. 7 citing *Chesal v. Attorney General of Nova Scotia* (2003) 2003 NSCA 124 (CanLII) at para. 38.

- There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged.[70]
- Evidence of harm must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever.[71]
- Stating disclosure of a record will cause undue harm or loss does not alone constitute harm.[72]

[123] The Nova Scotia Supreme Court recently revisited the "reasonable expectation of harm" test in *FOIPOP*. In *Monkman v. Serious Incident Response Team*[73] the Court examined the leading Nova Scotia case and the leading Supreme Court of Canada case on the meaning of the reasonable expectation of harm test in the context of the application of s. 15 of *FOIPOP* (harm to law enforcement). The Court concluded that:

> [61] Reading the decisions of the Supreme Court of Canada with that of the Nova Scotia Court of Appeal leads to the following conclusion: that the burden falls on the Director to show that it is more than merely possible, but at a standard less than a balance of probabilities that the disclosure could harm "law enforcement".

[124] One of the biggest challenges in assessing whether or not a harms-based exemption applies to a particular circumstance is the fact that, in general, the evidence supplied by the parties tends to go no further than mere assertions of harm. Consistent with the purposes of *FOIPOP*, there is an expectation of openness with respect to financial and commercial information held by public bodies. Section 21 speaks of undue loss and significant harm. Therefore, *FOIPOP* clearly contemplates that some harm may occur from a disclosure. It is only harm that can satisfy the tests set out in s. 21(1)(c) that can support a claim that the information must be exempted from disclosure.

[125] As a practical matter, mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm or at least evidence of harm from the third party and the public body is helpful, evidence of previous harm from similar disclosures is also useful, and evidence of a highly competitive market would all assist in determining whether the test has been satisfied. In all cases, it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.[74] Alternatively, some empirical, financial or statistical evidence would generally be required to substantiate the third party arguments.

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[70] NS Review Report FI-06-13(M) at p. 7 citing *Lavigne v. Canada (Office of the Commission of Official Languages)* [2002] 2 SCR 773, 2002 SCC 53 (CanLII) at para. 58.
[71] NS Review Report FI-06-13(M) at p. 7 citing *Canada (Information Commissioner of Canada) v. Canada (Prime Minister) (T.D.)*, [1991] 1 F.C. 427, 1992 CanLII 2414 (FC).
[72] NS Review Report FI-06-13(M) at p. 7.
[73] *Monkman v. Serious Incident Response Team*, 2015 NSSC 325 at pp. 22-23.
[74] I have applied this approach in other review reports such as NS Review Report 16-01 at para. 32, FI-10-59(M) at para. 66 and FI-09-100 at para. 45.

[126] With that in mind I reviewed the submissions provided by the parties with respect to the harms that might arise should the withheld information be disclosed. After reciting the words of s. 21(1)(c)(i), the third party asserts that that public disclosure of terms would mean that lenders could rely on such knowledge to impose similar or more onerous terms. With respect to s. 21(1)(c)(iii), the third party states that the imposition of similar or more onerous terms would result in undue financial loss to the third party. This is the extent of the argument received.

[127] The public body submission with respect to the satisfaction of the s. 21(1) harms test consists of the following two sentences: "It also meets the third part of the test because its disclosure would reasonably be expected to harm the competitive position of [the third party]. It constitutes specific information related to obligations, assets and plans and if disclosed could jeopardize its position relative to future bidding processes."

[128] The submissions in this matter are mere assertions consisting almost entirely of a recitation of the test set out in *FOIPOP*. There is no explanation for how or why a lending organization might rely on the terms of this agreement to the disadvantage of this third party. Nor is any evidence offered as to why such an outcome might reasonably be expected to "harm significantly" the competitive position of the third party. Likewise, no evidence was offered as to how such an outcome would result in undue financial loss or gain, or for that matter, any financial loss or gain.

[129] I find that the evidence fails to establish a reasonable expectation of any of the harms listed in s. 21(1)(c).

[130] Therefore, I find that the third party and the Department have failed to satisfy their burden of proof with respect to the application of s. 21(1) and so s. 21(1) does not apply to the withheld information.

[131] I recommend that the records be released in their entirety.

FINDINGS & RECOMMENDATIONS:

[132] I find that:

1. The Department was not authorized to withhold any information as "out of scope" or "not responsive".
2. The Department has failed to establish that the withheld information has "monetary value" within the meaning of s. 17(1)(b).
3. The disclosure of the third party name, title and signatures in this case would not be an unreasonable invasion of the third parties' personal privacy and so s. 20(1) does not apply to this information.
4. The evidence fails to establish that the information withheld under s. 21 was supplied in confidence as required under s. 21(1)(b) and further, the evidence fails to establish a reasonable expectation of any of the harms listed in s. 21(1)(c).

[133] I recommend the full disclosure of the remaining withheld information.

October 20, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia